(*January* 28th, 1724.)

INFORMATION

FOR

ANNA KER, Lady *Kerſland*, and *John Ker* alias *Crawfurd* of *Kerſland* her Husband for his Intereſt,

AGAINST

MARGARET KER, and Mr. *Thomas Linning* Miniſter at *Leſmahago*, her Husband.

THE deceaſt *Robert Ker* of *Kerſland*, being forfeited in the 1669, died in the Year 1680, and thereafter his Spouſe *Barbara Montgomery* deceaſed before the 1688, leaving behind them Major *Daniel Ker* their Son and Heir, who had the Benefit of the Act Reſciſſory in Favours of forfeited Perſons, and he likewiſe deceaſed in the 1692, leaving behind him *Jean* his eldeſt Siſter Heir, married to Major *William Borthwick*, and three other Siſters, of whom I ſucceeded to the Eſtate after my Siſter *Jean*.

The deceaſt *Robert Ker* our Father, had in the Year 1666, made a Settlement wherein among other Things, he provides 18000 M. to his Daughters. And the ſaid *Margaret* with Concourſe of her Husband, did inſiſt againſt me and the ſaid *Jean Ker* for a proportional third Part of the ſaid Sum, which Proceſs ended in a Tranſaction, whereby the ſaid *Jean Ker* and her Husband, granted Heritable Bond in the 1693 for the Sum.

In *anno* 1696, the ſaid *John Ker*, in Name and Behalf of me the ſaid *Anna Ker*, did confirm the Teſtament of the deceaſt *Robert Ker*, *Margaret Montgomry*, and *Daniel Ker*, wherein the principal Article is the Rents of the Eſtate of *Kerſland*, charged at 3000 *L.* yearly, from the Year 1669 to the Year 1688, as uplifted by the Viſcount of *Strathallan*, Donatar to the Forfeiture of the Eſtate.

All this was no Secret to the ſaid *Margaret Ker* and her Husband, but they knew very well that little or nothing could be recovered of theſe bygone Intromiſſions by the Donatar preceeding the Revolution, and therefore in their Diſcharge and Renunciation, dated in the 1699, 3 Years after the Confirmation, bearing a Recital of the Bond of Proviſion, and heritable Bond abovementioned, *And that Major* Borthwick *in Name and Behalf of* Jean Ker *his Spouſe, had paid* 1500 *Merk, & that I the ſaid* John Crawfurd *had made Payment of* 5237 *Merks* 6 ſh. 8 d. *and for the Love and Favour which they bore to the ſaid* Jean Ker *and her Husband, They accept the ſame in full Satisfaction of the Sum in the Bond of Proviſion and heritable Bond abovementioned, and diſcharges the ſaid* Jean Ker *and her Husband, and me the ſaid* John Crawfurd, and then follows at Letter A, *And ſicklike of allmoveable Debts, Sums of Money, Goods, Gear, and Executry whereunto I and my Husband for his Intereſt, has or can claim Right or Intereſt in, as Executor to the ſaid deceaſt* Robert Ker *my Father, and Major* Daniel Ker *my Brother German*, and the Diſcharge contains abſolute Warrandice.

We believed our ſelves perfectly ſecure by this Diſcharge, but to our great Surprize a Proceſs was intented in the 1714, at the Inſtance of the ſaid *Margaret* and her Husband, wherein is libelled a Proportion of 40000 *L.* provided to the Daughters, in Caſe none of them ſucceded to the Eſtate, and alſo her Proportion of the Relict's third Part of 30000 *L.* as the Rents that fell due from the 1669 to the 1680 the Time of our Father's Deceaſe, and likewiſe a third Part of 28000 *L.* as the pretended Terce Rents that fell due to the Relict from the 1680 to the 1688: All theſe bulkiſh Claims, I contend, are cut off by the Generality of the Diſcharge abovementioned, and in this very Proceſs, your Lordſhips have aſſoilied me from the firſt grand Article, but the other two are to be reported to your Lordſhips by the Lord *Cullen*, whether or not the ſame can be underſtood to fall under the Diſcharge.

Your

Your Lordſhips will remember the Fact, That the ſaid *Barbara Montgomery* died before the Revolution; The Queſtion then is, 'How far her Heirs and Exe-'cutors could be underſtood to have Acceſs againſt the Donatar for the bygone 'Liferent Duties, preceeding the 1688; Or if only the forfeiting Perſon, if alive 'the Time of the Act Reſciſſory, or his Repreſentative, if he was dead, had the on-'ly Right and Acceſs to theſe Bygones; Or at leaſt admiting that the Repreſenta-'tives of ſuch Wives be intituled to their *jūs relictæ*, bygone Liferent Duties, or 'the like, and whether or not the Action was only competent againſt the Heir of the 'Perſon reſtored, who had the *jus exigendi*?

Both theſe Points depend upon the Act of *Parliament*, the Words of the Clauſe in the General Act are. *And further ordain the Perſons Forfeited, and the Heirs of them that are deceaſſed to be fully repoſſeſſed to their Lands &c. With full Right and Acceſs to all bygones ſince the Term of* Martinmaſs 1688, *as likeways to all bygones whatever Intrometted with by any Donatar in the Caſe of ſpecial Reaſons and Acts to be paſſed thereanent.* In the Terms of the laſt part of this Clauſe, there was a private Act in Favours of Major *Daniel Ker* of *Kerſland*, Repreſentative of *Robert Ker*, the Forfeiting Perſon, which Act, tho' not produced, muſt be preſumed to be in Terms of the foreſaid Clauſe in the General Act, unleſs it be made appear, that it was Otherways conceived, which it is incumbent upon the Purſuer to prove. As for my own Part, I was never Maſter of it.

As to the firſt Point, it would ſeem indeed conſonant to the Nature of the Thing, as well as the deſignand Words of the Act of Parliament that Wives or Relicts of Forfeiting Perſons having Deceaſed before the Revolution, there Repreſentatives could not be Intitled to Bygones, either with reſpect to a ſhare of the moveables in Communion betwixt Husband and Wife, or the Rents that fell under their Liferent or Terce, the Time of the Forfeiture: By the Act Reſciſſory the Perſons forfeiting, were only reſtored to the Mails and Duties that fell due after the Revolution, the Donatars being not only *bona fide* Poſſeſſors as to bygones, but truly Proprietars of the Subject it ſelf, by the Laws at the Time; and as to what fell due after the Revolution, there is no doubt but every Thing and Perſon was reſtored, and put *in ſtatu quo.*

The Caſe being thus, the Particular Acts that had a retroſpect to bygone Reſts, were a Favour and Priviledge granted upon *ſpecial Reaſons*, and cannot be extended beyond the Perſon to whom the Indulgence was made; ſo that only the forfeiting Perſon, or his Repreſentatives, can be entitled to that Benefit: This Is the general Rule in Law, and would take Place; even though the Act of Parliament did not expreſly mention the ſame as above noticed.

There is no Queſtion, but theſe ſpecial Acts were obtained in Conſideration of the *ſufferring Family*, and are expreſly granted to the Perſon himſelf who fell under the Laſh of the former Government; Or his Repreſentatives: So that it cannot be underſtood, that the Repreſentatives of a Relict, were to carry off any of the Bounty of the Government.

It is very true, the ſpecial Act may bear *per modum juſtitiæ*; But that is only to give Colour to the Priviledge, but not to extend the Benefit: For no Body can doubt, but it was the greateſt Favour was ever allowed in any Government, that the Rents enjoyed by Vertue of Gifts of Forfeiture, (which are Titles of abſolute Property) ſhould be repeated: The particular Acts themſelves ſpeak out the Deſign of the Parliament, being to be granted for *ſpecial Reaſons*, as the Reſerve in the general Act provides: Theſe ſpecial Reaſons could not reſpect the Repreſentatives of Wives, ſince they might not be perhaps of the Family of the forfeiting Perſon.

Let the Caſe be put, That a Wife died immediately before the Revolution, not having Children of the Marriage; and that the Husband, for ſpecial Reaſons, obtained a particular Act, reſtoring him to the Rents, from the Date of the Forfeiture: That Act muſt certainly have been intended, for the Good of the Family, and all the Benefit muſt go that Way. What an Abſurdity then were it to pretend, that the one Half of theſe Rents ſhall belong to the Repreſentatives of the Wife, in Right of the Communion? and yet, if the Purſuer's Doctrine ſhould hold this were the Caſe, It is moſt certain, among private Parties, That *actus agentium non operantur ultra eorum intentionem*, which muſt equally hold in the Acts of Government, more eſpecially as to Priviledges, which are *contra rationem juris introducta*, and are juſtly termed *jus ſingulare*, reſpecting the particular Perſons alone to whom the Grant is made.

As this is the Nature of all ſuch particular Acts of Parliament, or Priviledges, So likewiſe, the Nature of the *jus relictæ* and *terce*, does neceſſarly require it: The Relict's Share of the Moveables, muſt be conſidered as the Husband's Circumſtan-

ces

tes were at the Diſſolution, and the Terce can only take Place, with Reſpect to the Lands, in which the Husband died inſeft: But ſo it is, That, when *Kerſland* died in the 1680, he had neither Right to the Moveables, *viz.* the bygone Rents of the Lands, nor to the Lands themſelves, And yet theſe are the only Subjects, out of which the *jus relictæ* and Terce Duties are acclaimed: All theſe were fully veſted in the Property of the Government and Donatar, by the Laws of the Land, at the Time. And though the Right was thereafter conferred upon the Repreſentative of the Husband; yet that was for ſpecial Reaſons and Conſiderations, which could not concern the Relict, who was deceaſed before the Grant took Place, but was ſolely for the Behoof of the Repreſentative of the Family.

This being eſtabliſhed, and ſo found by your Lordſhips, there will be no Occaſion to labour the other Point, namely, *That admitting* the Benefit of the Reſtitution ſhould accrew to the Relict as her *jus relictæ*, in the bygone Reſts, preceeding her Husband's *Death*, and the Third of the Duties of the Lands, as her Terce, from that to her own Deceaſe; yet ſhe could only lay her Claim for the ſame againſt the Repreſentative of the Perſon reſtored.

This will appear plain from two Conſiderations, Firſt, That it is only the Perſon reſtored, or his Repreſentative, that can acclaim, in Vertue of theſe Acts, the Bygones from the Donatar; It was only in the Perſon of the Husband, that the Right was forfeited; and conſequently the Act reſciſſory affords him the only Claim of Repetition: Beſides, that the Words of the Act expreſly bear the forfeiting Perſon, if alive, (or if dead) his Repreſentative.

Next, it would ſeem contrary to the Nature of the Thing, That Wives, or their Repreſentatives ſhould have direct Action againſt the Donatar, ſince they were in no Capacity to diſcharge him: The Donatar owned no Right as flowing from them; but only as in the forfeiting Perſon, And therefore, the Reſtitution of the Forfeiture could only give a Title to the forfeiting Perſon, to diſcharge the Debt: And whatever fiduciary Right might be conceived in the Perſon reſtored, for the Behoof of the Wife, or her Repreſentative, that was only to be made good by the Perſon reſtored, by Way of Claim upon him.

The import of this Argument is to ſhow that the Generality of the Purſuers Diſcharge bearing *for Love and Favour and a Diſcharge of all Moveable Debts, Sums of Money* &c. *Whereunto ſhe and her Husband, for his Intereſt; had Right or Intereſt as Executor to her Father and Brother*, muſt comprehend the preſent Claim: For admitting that her Mother, who died before the Revolution, was entitled to any ſhare of the bygone Rents, either *Jure relictæ*, or for a Terce, yet ſtill ſhe could only claim it from the Repreſentatives of her Father, or Brother, and conſequently it falls under the Diſcharge: There was nothing elſe intended by this Generality, but to clear all manner of Queſtions, that might afterward be moved, tho' indeed, at the Time, it was not believed, that any Pretenſions could poſſibly have been made in virtue of Rights in the Perſon of the Wife, for otherways the Matter had been more clearly expreſſed.

It is of no Moment, that the Title of the Confirmed Teſtament takes in *Barbara Montgomery* the Relict, as well as *Kerſland*, and his Son: For if ſhe had no direct Right in her Perſon to the Subject confirmed, it is impoſſible that the Confirmation could alter the Caſe. And her Name was only taken in by the overmuch Cautiouſneſs of my Doer, who expede the Confirmation, Relying upon the *Maxim*, that *quæ abundant non nocent.*

There is one Conſideration ſtill, (now ſince we are upon the Teſtament) that may convince any Mortal that the general Clauſe was intended to comprehend the whole Subject confirmed, why elſe, am I diſcharged of all Moveables, Executrie, *&c.* That the Purſuer could Claim as Heir or Executor to her Father and Brother. I was not concerned in the Heretable Bond ſpecially mentioned in the Diſcharge, but only *Jean Ker* the Heir: I was confirmed Executor to the Purſuer's Father and Brother to the whole Rents of the Lands Forfeited from the Year 1669 to the 1688 promiſcuouſly. Is it not then a natural Preſumption, that the whole was intended to be Contained in the Diſcharge? More eſpecially that it is plain that the Act Reſciſſory did veſt the whole bygone Rents in the Perſon of *Daniel Ker* the Perſon reſtored.

Its hoped your Lordſhips will be of Opinion that the Repreſentatives of the Wife that died before the Revolution were not intitnled to any Benefite by the Act Reſciſſory, either as to *a jus relictæ* or Terce of the Lands forfeited, as to bygones, or at leaſt, that any poſſible Claim they could have was only againſt the Repreſentatives of the Perſon reſtored, and conſequently that the ſame falls under the Diſcharge.

In Reſpect whereof, &c. AND. M^cDOUALL.

Mrs Thomas Linien —
17 June 1724.

BRITISH
2 JY 94
MUSEUM